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THE STATUTORY SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS IN THE COURTS:

A YEAR 2000 SCORECARD

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One of the most heralded components of the Private Securities Litigation Reform Act (PSLRA) is the safe harbor provision for forward-looking statements,[1] which is intended to protect companies from liability for making what turn out to be overly optimistic predictions about future performance. The core concepts are familiar by now: an issuer's projection or forward-looking statement is immunized from securities law liability if the statement is identified as such and accompanied by meaningful, cautionary statements disclosing important factors that could cause actual results to differ materially. Such statements are also not actionable if they are immaterial, or if defendants are not shown to have had actual knowledge of the falsity of the statements.[2]

We now have the benefit of three decisions by Court of Appeals,[3] and sixty-three district court rulings[4] that have construed the scope of the safe harbor provision and applied it in

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[1]*See* 15 U.S.C. § 77z-2 (Supp. II 1996). This article, which addresses the case law as it stood as of August 23, 2000, is an updated and substantially revised version of the Scorecard presented at the 31st Annual Institute last year, which was republished in the Winter 2000 issue of the Securities Regulation Law Journal. Thanks are due to Ashfaq G. Chowdhury, a Paul Weiss summer associate, for his assistance in preparing this update.

[2]For a comprehensive discussion of the statutory structure and the earliest case law, see my prior article, Richard A. Rosen, The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has it Changed the Law? Has it Achieved What Congress Intended?, 76 WASH. U. L.Q. 645 (1998).

[3]Helwig v. Vencor, 210 F.3d 612 (6th Cir. Apr. 24, 2000); Harris v. Ivax Corp., 182 F.3d 799 (11th Cir. 1999); In re Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999). A fourth appellate decision, Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999), holds that a district court should consider the SEC filings of the defendant at the motion to dismiss stage of the lawsuit if the complaint attacks the adequacy of disclosure in those same documents. But the court remanded for consideration of whether the statutory safe harbor protected the company's statements.

[4]*See* Ruskin v. TIG Holdings, Inc., 2000 WL 1154278 (S.D.N.Y. Aug. 14, 2000); Cheney v. Cyberguard Corp., 2000 WL 1140306 (S.D. Fla. Jul. 31, 2000); *In re* Theragenics Corp. Sec. Litig., 2000 WL 1028754 (N.D. Ga. Jul. 20, 2000); *In re* Staffmark, Inc. Sec. Litig., 2000 U.S. Dist. LEXIS 10023 (D. Ark. June 30, 2000); Bryant v. Apple South, Inc., 100 F. Supp. 2d 1368 (June 23, 2000); *In re* Cell Pathways, Inc. Sec. Litig., 2000 WL 805221 (E.D. Pa. June 20, 2000);

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Chu v. Sabratek Corp., 100 F. Supp. 2d 827 (N.D. Ill. June 13, 2000); Sherleigh Associates, LLC v. Windmere-Durable Holdings, Inc., 2000 U.S. Dist. LEXIS 9772 (S.D. Fla. June 8, 2000); *In re* The Vantive Corp. Sec. Litig., 2000 WL 960114 (N.D. Cal. May 19, 2000); *In re* Milestone Scientific Sec. Litig., 103 F. Supp. 2d 425 (D.N.J. May 31, 2000); *In re* Ciena Corp. Sec. Litig., 99 F. Supp. 2d 650 (D. Md. May 15, 2000); Fellman v. Electro Optical Systems Corp., 2000 U.S. Dist. LEXIS 5324 (S.D.N.Y. Apr. 25, 2000); *In re* World Access, Inc. Sec. Litig., FSLR ¶90,941 (D. Ga. Mar. 28, 2000); *In re* Engineering Animation Sec. Litig., FSLR ¶90,945 (D. Iowa Mar. 24, 2000); Ehlert v. Singer, 85 F. Supp. 2d 1269 (M.D. Fla. 1999); *In re* BankAmerica Corp., 78 F. Supp. 2d 976 (E.D. Mo. 1999); *In re* Sunbeam Sec. Litig., 89 F. Supp. 2d 1326 (S.D. Fla. 1999); *In re* APAC Teleservices, Inc. Sec. Litig., FSLR ¶90,705 (S.D.N.Y. Nov. 19, 1999); Griffin v. GK Intelligent Systems, Inc., 87 F. Supp. 2d 684 (S.D. Tex. 1999); *In re* Quintel Entertainment Inc. Sec. Litig., 72 F. Supp. 2d 283 (S.D.N.Y. 1999); Buck v. Piercing Pagoda, Inc., FSLR ¶90,670 (E.D. Pa. 1999); *In re* Stratosphere Corp. Sec. Litig., 66 F. Supp. 2d 1182 (D. Nev. 1999); Ruskin v. TIG Holdings, FSLR ¶90,657 (S.D.N.Y. 1999); *In re* Manugistics Group, Inc. Securities Litigation, FSLR ¶90,638 (D. Md. Aug. 6, 1999); *In re* Cendant Corp. Sec. Litig., 60 F. Supp. 2d 354 (D.N.J. 1999); *In re* 3Com Sec. Litig., FSLR ¶90,522 (N.D. Cal. July 8, 1999); Andrews v. Green, 1999 WL 2003408 (D. Me. June 11, 1999); Karacand v. Edwards, 53 F. Supp. 2d 1236 (D. Utah 1999); *In re* Oxford Health Plans, Inc. Sec. Litig., 187 F.R.D. 133 (S.D.N.Y. 1999); P.Schoenfeld Asset Management, LLC v. Cendant Corp., 47 F. Supp. 2d 546 (D.N.J. 1999); *In re* Ceridian Corp. Sec. Litig., 1999 U.S. Dist. LEXIS 15611 (D. Minn. Mar. 29, 1999); *In re* PLC Systems, Inc. Sec. Litig., 41 F. Supp. 2d 106 (D. Mass. 1999); Leventhal v. Tow, 48 F. Supp. 2d 104 (D. Conn. 1999); *In re* Physician Corp. of America Sec. Litig., 50 F. Supp. 2d 1304 (S.D. Fla. 1999); *In re* Aetna Inc. Sec. Litig., 34 F. Supp. 2d 935 (E.D. Pa. 1999); *In re* Home Health Corp. of America Sec. Litig., FSLR ¶90,414 (E.D. Pa. Jan. 29, 1999); Copperstone v. TCSI Corp., 1999 U.S. Dist. LEXIS 20978 (N.D.Cal. Jan. 19, 1999); Kensington Capital Mgmt. v. Oakley, Inc., FSLR ¶90,411 (C.D. Cal. Jan. 14, 1999); Lister v. Oakley, Inc., FSLR ¶90,411 (C.D. Cal. Jan. 14, 1999); Schaffer v. Evolving Sys., Inc., 29 F. Supp. 2d 1213 (D. Colo. 1998); Walsingham v. Biocontrol Tech., Inc., 66 F. Supp. 2d 669 (W.D. Pa. 1998); Allison v. Brooktree Corp., 1998 U.S. Dist. LEXIS 21859 (S.D. Cal. Nov. 25, 1998); *In re* MobileMedia Sec. Litig., 28 F. Supp. 2d 901 (D. N.J. 1998); EP Medsystems, Inc. v. EchoCath, Inc., 30 F. Supp. 2d 726 (D.N.J. 1998); Robertson v. Strassner, 32 F. Supp. 2d 443 (S.D. Tex. 1998); *In re* Employee Solutions Sec. Litig., 1998 WL 1031506 (D. Ariz. Sept. 22, 1998); Geffon v. Micrion Corp., 1998 U.S. Dist. LEXIS 15773 (D. Mass. Sept. 24, 1998); *In re* Olympic Fin. Ltd. Sec. Litig., 1998 U.S. Dist. LEXIS 14789 (D. Minn. Sept. 10, 1998); *In re* Boeing Sec. Litig., 40 F. Supp. 2d 1160 (W.D. Wash. 1998); Bryant v. Apple South, Inc., 25 F. Supp. 2d 1372 (M.D.Ga. 1998); Clark v. TRO Learning, Inc., 1998 U.S. Dist. LEXIS 7989 (N.D. Ill. 1998); Blum v. Semiconductor Packaging Materials Co., 1998 WL 254035 (E.D. Pa. May 5, 1998); Ronconi v. Larkin, 1998 WL 230987 (N.D. Cal. May 1, 1998); Queen Uno Ltd. Partnership v. Coeur D'Alene Mines Corp., 2 F. Supp. 2d 1345 (D. Colo. 1998); *In re* Stratosphere Corp. Sec. Litig., 1 F. Supp. 2d 1096 (D. Nev. 1998); Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231 (N.D. Cal. 1998); Molinari v. Symantec Corp., 1998 WL 78120 (N.D. Ga. Nov. 10, 1997); *In re* Valujet, Inc., Sec. Litig., 984 F. Supp. 1472 (N.D. Ga. 1997); Rasheedi v. Cree Research, Inc., 1997 WL 785720 (M.D.N.C. Oct. 17, 1997); Gross v. Medaphis Corp., 977 F. Supp. 1463 (N.D. Ga. 1997); Hockey v. Medhekar, FSLR ¶99,465 (N.D. Cal. 1997); Fugman v. Aprogenex, Inc.,
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the context of motions to dismiss. What do these decisions tell us about the parameters and meaning of the safe harbor provision? And what are we to make of the fact that in thirty-three of the reported cases, the defendants lost all or part of their motion? Does this mean that the safe harbor provision does not work?

It is quite frustrating to try to glean significant lessons from the cases. Only a few of the decisions to date refer to any of the other cases; almost all of them are intensely fact-specific. Moreover, too often judges, despite writing deceptively long opinions, offer little or no analysis. The application of the statute to the facts continues to be abrupt and rather conclusory. From an advisory and corporate strategy standpoint, it is worrisome that courts are still not being entirely consistent, which perpetuates substantial unpredictability. Nevertheless, some lessons can be deduced and incipient trends discerned from a close reading of all the cases.

A. The Threshold Question: Is the Statement Forward-Looking?

A large number of cases (nineteen)[5] reject application of the safe harbor provision on the ground that the challenged statement is not forward looking at all, but rather a statement of present or historical fact. Many of these cases surely are decided correctly. A statement about the size of the company's orders and backlog,[6] a statement that "development is progressing on

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961 F. Supp. 1190 (N.D. Ill. 1997).

[5]*See* Cyberguard, 2000 WL 1140306; Cell Pathways, 2000 WL 805221; Sunbeam, 89 F. Supp. 2d 1326; APAC, 1999 U.S. Dist. LEXIS 17908; Quintel, 72 F. Supp. 2d 283; 3Com, FSLR ¶90,522; Oxford Health, 187 F.R.D. 133; Physician, 50 F. Supp.2d 1304; Aetna, 34 F. Supp. 2d 935; Home Health, FSLR ¶90,414; TCSI, 1999 U.S. Dist. LEXIS 20978; Biocontrol, 66 F. Supp.2d 669; MobileMedia, 28 F. Supp.2d 901; Robertson, 32 F. Supp.2d 443; Employee Solutions, 1998 WL 1031506; Micrion, 1998 U.S. Dist. LEXIS 15773; Olympic, 1998 U.S. Dist. LEXIS 14789; Valujet, 984 F. Supp. 1472; Medaphis, 977 F. Supp. 1463.

[6]Micrion, 1998 U.S. Dist. LEXIS 15773 *10-11.

the original construction schedule,"[7] or a statement about the quality of a company's loan portfolio[8] clearly are statements about existing, knowable facts. By contrast, a couple of holdings that statements concerning the adequacy of insurance company reserves are statements of present fact are troubling, since a reserve reflects a projection of future liability costs.[9]

A recent example of a correct application of the distinction is found in *In re APAC Teleservices, Inc.*.[10] The Court found that defendants' statement that APAC "has been very successful at beginning with a small amount of work with clients and earning the right to expand the services to those clients by offering the quality and service they've come to expect" was not a forward-looking statement eligible for safe harbor treatment.[11] The complaint had focused on the allegation that defendants already knew at the time the statement was made that APAC's largest client--UPS--was "extremely dissatisfied" with APAC's services.[12] The Court held that "[l]inking future success to present and past performance does not render statements immune from liability."[13] This conclusion seems unavoidable, given that "[a]llegations based upon omissions of existing facts or circumstances do not constitute forward-looking statements protected by the safe harbor[.]"[14]

Determining whether a statement is about present or historical fact, or is instead a projection, is not always easy. The issue will continue to bedevil the courts for a long time to

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[7]Robertson, 32 F. Supp. 2d at 450.

[8]Olympic, 1998 U.S. Dist. LEXIS at *13-14.

[9]Employee Solutions, 1998 WL at *3-5; *see also* Physician, 50 F. Supp.2d at 1318.

[10]APAC, 1999 U.S. Dist. LEXIS 17908.

[11]*Id.* at *22-23.

[12]*Id.*

[13]*Id.* (citing Micrion, 1998 U.S. Dist. LEXIS 15773).

[14]Cell Pathways, 2000 WL 805221 at *11 (citing Mobilemedia, 28 F. Supp. 2d at 930).

come. One of the best analyses of the fact vs. projection issue is found in last year's decision of the 11th Circuit Court of Appeals, *Harris v. IVAX Corp.*[15] The Court wrote:

> The August 2, 1996 press release also announced optimistically that "the challenges unique to this period in our history are now behind us." Taken in context, this statement is forward-looking. The two paragraphs of the press release preceding this statement describe two problems that contributed to a loss in the second quarter: excessive customer inventories, which reduced new orders, and a technical default in a revolving credit facility. Both problems, the statement said, were being resolved; inventories were becoming depleted, and the bank syndicate was expected to waive the default. Thus the chairman and CEO announced that things were looking up.
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> "Forward looking statements" include "statements of future economic performance." 15 U.S.C. § 75u-5(i)(1)(C). The chairman and CEO's hopeful conclusion that conditions are better because of two anticipated improvements in business conditions is a prediction of economic performance, however couched. The plaintiffs' purely grammatical argument to the contrary -- that a present-tense statement cannot predict the future -- is unpersuasive; a statement about the state of a company whose truth or falsity is discernible only after it is made necessarily refers only to future performance. Whether the worst of Ivax's challenges were behind it was a matter verifiable only after the chairman so declared. This statement was thus forward-looking and in the safe harbor.[16]

The Eleventh Circuit in *IVAX* also addressed a question of first impression. One of the disclosures in controversy was a press release that contained a list of factors that were expected to influence the company's results. Some factors involved business conditions that had already been observed by the company (e.g., "prices have continued to decline"). Observed facts of this type are not assumptions and are not predictions, but other factors on the list did represent assumptions about future events. The claim in the case was that the list, as a whole, mislead anyone who was seeking an explanation of the company's projections because the list omitted an important factor -- the plaintiff's claim was that the company expected a significant write down of its good will, but failed to disclose it. The Court therefore had to decide whether the safe harbor protects the entire list of factors, or only individual subparts.

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[15] 182 F.3d 799.

[16] *Id*. at 805.

The Court concluded that, since the allegation was that the whole list was misleading, it would make no sense to "slice the list into separate sentences". Rather, the list became a "statement" within the meaning of the Reform Act, and thus had to be analyzed as a unit. The Court went on to reason that the list must either be forward-looking or not forward-looking in its entirety and concluded that the entire list must be accorded "forward-looking treatment", both because the statute does not distinguish between misleading statements and misleading omissions and for the practical reason that forward-looking *conclusions* can rest both on historical observations and assumptions about the future. If, the Court said, lists that incorporated both factual and forward-looking factors were outside the scope of the safe harbor, issuers would be inhibited from fully explaining the reasons for their expectations.[17]

Why is it that many of the safe harbor cases turn out to be about statements of present fact? My hypothesis is that the plaintiffs' bar is doing a good job of "picking its spots." Defendants, by contrast, don't have that luxury. Indeed, it would appear that defendants are routinely invoking the safe harbor provision even in situations where the argument is very weak. There is an enormous incentive to move to dismiss every complaint because filing such a motion triggers the automatic stay of discovery. Defendants, it appears, thus continue to feel compelled to raise the issue at every turn, perhaps taking comfort in the fact that there is still relatively little developed law on the statute. It is still true that many judges will never have had to deal with the PSLRA before.

By the same token, the "scorecard" on this issue does not mean that the safe harbor provision is not working. The statute appears to be deterring the filing of cases in the first place where an issuer that has met the requirements of the Act then fails to achieve its projections. The

[17] *Id*. at 806. The reasoning of IVAX has been followed with respect to this issue. *See*, Apple South II, 100 F. Supp. 2d at 1382 (citing IVAX); Ehlert, 85 F. Supp. 2d at 1273 (same);

most recent quantitative analyses of cases suggest that relatively few pure projection cases are being filed.

B. Is the Cautionary Language "Meaningful"?

Defendants have had mixed results in their efforts to persuade district courts that the safe harbor provision applies because the cautionary language used was sufficiently "meaningful" and related to the prediction at issue. One of the most illuminating cases on this issue is *In re Boeing Securities Litigation*, decided in the Western District of Washington in September of 1998. The Court rejected safe harbor protection for the issuer's forward-looking statement that it was "making progress in improving efficiency" because there were no warnings identifying the specific risk factors that could adversely affect the company's development of systems to improve efficiency. By characterizing other cautionary language as boilerplate, the Court put real teeth into the requirement that cautionary statements be tailored to each projection.[18]

So how far does an issuer have to go in tailoring its risk disclosures to avoid the fatal charge that its cautionary language is mere boilerplate? The courts are not consistent, perhaps because there is an inevitable element of subjectivity involved in assessing this issue. At one extreme, in *Kensington Capital Management* v. *Oakley, Inc.*,[19] the Company's prospectus warned that its new product, X Metal, could be delayed because of the complexity of its design and the processes needed to manufacture it. Not good enough, said the Court. The judge found that this was merely a generic warning that was not sufficiently related to the characteristics of the

[18]*See* Boeing, 40 F. Supp. 2d at 1167-69 (concluding that warnings were not sufficiently clear nor specific to warrant dismissal under Federal Rule 12(b)(6)).

[19]1999 U.S. Dist. LEXIS 385.

specific product, which plaintiffs alleged required the adoption of a costly new production technology.[20]

In sharp contrast, in *IVAX*, the company's optimistic statements about its future performance in the generic drug industry were held to be protected because the issuer identified "in detail what kind of misfortunes could befall the company and what the effect could be."[21] Thus, the company's cautionary language was found to be sufficiently meaningful because it was tailored to and described with some precision (and, as it turns out, prescience!) the problems of the generic drug industry in which it was competing: increased competition, the purchasing decisions of existing customers, volatility in the industry, and the unpredictability of the degree and timing of price competition.[22][P]ress releases warned that the projections contained within them could be materially affected by, among other things, increased competition and the purchasing decisions of existing customers, the volatile nature of the generic drug industry itself and the unpredictability of the degree and timing of price competition, the speed of the restructuring of the production facilities, mistaken estimates and assumptions concerning customer inventory shelf stock adjustments, as well as [other factors incorporated by reference from SEC filings].

Not surprisingly then, the more specific and concrete the projection, the more specific the correlative risk factors have to be.[23] Issuers that fail to review and revise their risk factor

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[20]*See also*, World Access, 2000 U.S. Dist. LEXIS 4245 at *30 (safe harbor cautionary statement prong not applicable because warnings were minimal boilerplate language).

[21]*Id*. at *19.

[22]The 11th Circuit approvingly cited the lower court's discussion of the adequacy of the cautionary language, *id*. at *18. The District Court's language, in Harris v. IVAX Corp., 998 F. Supp. 1449 (S.D. Fla. 1998), is worth quoting:

[23]For examples of cautionary statements that were found to satisfy the safe harbor requirements, *see*, Ciena, 99 F. Supp. 2d at 661; P.Schoenfeld, 47 F. Supp. 2d at 556; Ehlert, 85 F. Supp. 2d at

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disclosure quarterly are plainly asking for trouble. It has become a favorite plaintiffs' tactic, in support of an argument that the cautionary language is boilerplate, to show the judge how many quarters in a row the issuer used identical language, irrespective of changes in its business or in the marketplace.

This does not mean that an issuer has to anticipate and discuss everything that could conceivably go wrong. The cases that have squarely addressed the issue -- including the Eleventh Circuit -- correctly hold that it does not matter if the issuer fails to identify all factors that could adversely affect its projections, even if the issuer fails to anticipate the particular factor that ends up causing the earnings disappointment.[24] But, as a practical matter, this rule provides little solace. If the risk that comes to pass has a sufficiently material impact on the company, there is going to be a strong tendency for a court to find that it was unreasonable not to have anticipated it and thus to have identified it in advance.

C. The "Accompaniment" and "Identification" Requirements

The recent cases seem to indicate that the courts are not consistently construing the "identification" requirement strictly. While it is true that some courts have refused to apply the safe harbor provision because the forward-looking statement wasn't "identified" as such,[25] rigorous application of the identification requirement is not a conspicuous feature of the more recent cases. It appears that in most recent cases, judges have been increasingly willing to take it upon themselves to interpret the statement and make a determination as to whether it is forward-

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1273. For unsuccessful cautionary statements, *see*, World Access, 2000 U.S. Dist. LEXIS 4245 at *30; Sherleigh, 2000 U.S. Dist. LEXIS 9772 at *43-44.

[24]*Id*. at *19-20; Ehlert, 85 F. Supp. 2d at 1273; Rasheedi, 1997 WL at *2.

[25]Semiconductor Packaging, 1998 WL at *2 n.2.

looking, at least if the statement is, to the ordinary reader, forward-looking on its face.[26] But so far, the results are a matter of the luck of the draw, not doctrine. Issuers can take no comfort that the "identification" test will be applied gently in the crucible of litigation and must continue to insulate themselves by clearly identifying every forward-looking statement as such.

The "accompaniment" requirement continues to present a danger to unwary companies. Courts have found statements ineligible for safe harbor treatment because the forward-looking statement was not "accompanied" by cautionary language.[27] Although one court has recently held that written forward-looking statements need not actually contain the text of the cautionary language, but can incorporate it by reference from other documents, this remains a high risk drafting approach in light of the requirement that the projection be "accompanied" by the risk factors.[28] For example, another court recently found that the cautionary statements that defendants included in their 1997 prospectus would *not* qualify as language "accompanying" earnings predictions made in 1998 and 1999.[29]

D. Oral Forward-Looking Statements

In the context of informal communications like press releases and oral statements, senior management needs to be reminded to be especially careful. It is essential for a company official to issue a cautionary announcement at the beginning of every analyst conference call, or require callers to hear such a message (perhaps from the company's investment relations officer) in the course of the call-in procedure.

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[26]*See*, *e.g.*, Staffmark, 2000 U.S. Dist. LEXIS 10023 at 32; Electro Optical, 2000 U.S. Dist. LEXIS 5324 at 13; Medhekar, 1997 U.S. Dist. LEXIS 8558 at *14-15.

[27]Apple South I, 25 F. Supp. 2d at 1382; Symantec, 1998 WL at *5.

[28]Karacand, 1999 WL at *5-6, *12-13.

[29]Staffmark, 2000 U.S. Dist. LEXIS 10023 at *33-34.

A couple of cases have addressed the safe harbor for oral statements in detail, in the context of analyst conference calls.[30] The most illuminating is *Karacand v. Edwards*, decided in June 1999.[31] The company made a number of very bullish statements concerning its future level of production and sales on a conference call with analysts. Predictably, the complaint asserted that, at that very time, demand was weakening and sales were declining. But the Court relied upon the fact that the company had properly invoked the statutory safe harbor at the beginning of the conference call, explicitly drew the listeners' attention to its '34 Act disclosure documents, and even cautioned the analysts in the course of the call itself not to rely on backlog numbers as a good predictor of future results.

E. Actual Knowledge of Falsity

The section of the safe harbor that has received the most judicial attention over the last twelve months is clearly the "actual knowledge" provision. As a starting point, we note that under a close reading of the safe harbor statutory provision, a company that loses on the cautionary language issue (or which failed to use cautionary language in the first place) always has the option of arguing that, in any event, plaintiffs have failed to meet the standard of pleading defendant's actual knowledge of falsity. By now, twelve courts have correctly held for defendants on this alternative theory, including the Third Circuit.[32] So far, so good. In several recent decisions, in which the plaintiffs were found to have failed adequately to allege

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[30] *See* Queen Uno, 2 F. Supp. 2d 1345; Lumisys, F. Supp. 2d 1231.

[31] 1999 WL 396421. For another well-considered analysis of how the statutory safe harbor should apply to analysts' conference calls, see Lumisys, 2 F. Supp. 2d 1231.

[32] Advanta, 180 F.3d 525; *see also* Milestone, 103 F. Supp. 2d at 463; Vantive, 2000 WL 960114 at *4; Ciena, 99 F. Supp. 2d at 661-62; Electro Optical, 2000 U.S. Dist. LEXIS 5324 at *17; Ehlert, 85 F. Supp. 2d at 1273; Ruskin I, 1999 U.S. Dist. LEXIS 14860 at *14; Green, 1999 WL 2003408 at *7; TRO Learning, 1998 U.S. Dist. LEXIS 7989 at *17; Ceridian, 1999 U.S. Dist. LEXIS 15611 at *23; Brooktree, 1998 U.S. Dist. LEXIS 21859; Medhekar, 1997 U.S. Dist. LEXIS 8558 at *13.

actual knowledge of the falsity of defendants' forward-looking statements, the Court dismissed without further inquiry into the adequacy of the cautionary language.[33] These cases, too, are correctly decided.

But the converse is not true. If plaintiffs *do* adequately allege actual knowledge, some courts have recently held that the forward-looking statement can give rise to liability, without pausing to consider whether the statement is material or whether it was accompanied with cautionary language. This is where the courts are running into trouble.

It appears, then, that some courts are still having difficulty with one of the most critical elements of the safe harbor provision -- the fact that a forward-looking statement is immaterial as a matter of law if accompanied by meaningful cautionary language, irrespective of whether the defendants knew at the time that the statements were false or did not believe them.

In an illustration of how courts have gone off the tracks, one district judge recently held that, even though the company's earnings forecast was a forward-looking statement within the meaning of the Reform Act, and even though it was accompanied by appropriate cautionary language, the motion to dismiss had to be denied.[34] The court reasoned that the plaintiffs had adequately alleged that defendants had disseminated the earnings forecasts at issue at a time when they had actual knowledge that the quarter would really turn out much worse. Another district judge noted in dictum that, even assuming the statements at issue were forward-looking, they were not protected by the safe harbor because they were not "'accompanied by meaningful cautionary statements.'"[35] A third problematic ruling came down in *Ruskin v. TGI*

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[33]*See, e.g.*, Milestone, 103 F. Supp.2d at 464; Ciena 99 F. Supp.2d at 661-62; Emerald Green, 1999 WL 2003408 at *7-8; Ceridian, 1999 U.S. Dist. LEXIS 15611; TRO Leaning, 1998 U.S. Dist. LEXIS 7989 at *16-18.

[34]Evolving Sys., 29 F. Supp. 2d 1213.

[35]Quintel, 72 F. Supp. at 293 n.4.

Holdings,Inc.(*TGI* II), in which the Court, in dealing with a forward-looking statement, stated that "cautionary language does not protect material misrepresentations or omissions when defendants knew they were false when made" and denied application of the safe harbor.[36]

These cases are clearly wrongly decided. At least four other district courts have ruled in accordance with this rather plainly erroneous rule.[37] The three branches of the statutory safe harbor are deliberately drafted in the alternative, not the conjunctive. The defendant need only satisfy one of the three prongs, not all three.

As these cases go into discovery, more of them are likely to be disposed of at the summary judgment stage, when defendants demonstrate that plaintiffs cannot prove actual knowledge of falsity at the time the statement was made. For management and counsel, this translates into an imperative to retain documents on which the company relied in making the projection, so that if litigation later ensues, it can be shown that the projection had a good faith basis at the time.

F. The Continuing Relevance of Pre-Reform Act Case Law

Many courts, in considering the actionability of forward-looking statements continue to find pre-Reform Act cases helpful. For example, cases decided under the "bespeaks caution" doctrine[38] are routinely cited on the issue of whether a statement is really forward-looking or one of present fact, or whether the cautionary language is sufficiently meaningful. This shouldn't be surprising since -- as several courts have observed -- the Reform Act in many respects codified

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[36]2000 WL 1154278 at *7 (citing *In re* Prudential Sec. Inc. Ltd. Partnership Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996).

[37]*See* Cell Pathways, 2000 WL 805221 at 11 (citing Cendant); World Access, 2000 U.S. Dist. LEXIS 4245 at *30; Home Health, PSLR ¶90,414; Cendant, 60 F. Supp. 2d at 376. For further discussion of this trend, *see* John T. Bostelman and Walter J. Clayton III, *How Recent Court Decisions Have Construed the Cautionary Statements Requirement of the Safe Harbor*, Sec. Reg. Update, Sept. 27, 1999, at 15 fn. 23.

[38]*See, e.g., In re* Donald Trump Casino Sec. Litig., 7 F.3d 357 (3d Cir. 1993).

prior law. Moreover, because the safe harbor provision doesn't apply by its terms to various transaction types, such as IPOs, rollups, and tender offers, or to various entities, like LLCs and partnerships, one still sees cases that rely entirely on these judicially-developed doctrines.[39]

Courts are receptive to the argument that the safe harbor provision did not supplant the bespeaks caution doctrine in cases where the safe harbor provision may be inapplicable for purely technical reasons, *e.g.*, if an oral statement doesn't expressly refer to the public documents containing the requisite risk disclosure, but is nevertheless qualified by other publicly available information. Defendants can still argue, under such circumstances, that the statement is protected under the bespeaks caution doctrine. There also have been a few cases that apply the safe harbor provision and the bespeaks caution doctrine to the same statement.[40]

G. "Immaterial" Forward-Looking Statements

The "immateriality" doctrine is flourishing, as well. Many courts have dismissed claims on this ground without referring to the statutory safe harbor, in which this judge-made rule has now been adopted by Congress.[41] I believe that the legislatively adopted immateriality test will become increasingly important. A projection that doesn't meet any of the requirements of the other prongs, *e.g.*, even if it is not accompanied by any cautionary language, can still be immunized from liability if it is immaterial.

Issuers have several arguments for immateriality. Vague statements of optimism or mere puffery incapable of objective application, such as "the company is well positioned for growth,"

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[39]*See, e.g.*, *In re* Number Nine Visual Tech. Corp. Sec. Litig., 51 F. Supp.2d 1 (D. Mass. June 1, 1999).

[40]*See, e.g.*, Echocath, 30 F. Supp. 2d at 760-61; Medaphis, 977 F. Supp. at 1472;

[41]Advanta, 180 F.3d at 538-539; Lain v. Evans, 2000 U.S. Dist. LEXIS 9257 (N.D. Tex. June 30, 2000); Manugistics, FSLR ¶90,638; *In re* Peritus Software Serv., Inc. Sec. Litig., 52 F. Supp.2d 211, 229 (D. Mass. 1999); Krim v. Coastal Physician Group, Inc., 81 F. Supp. 621 (M.D.N.C. 1998) Stavroff v. Meyo, 987 F. Supp. 987, 998-1000 (N.D. Ohio 1995), *aff'd mem.*, 129 F.3d 1265 (6th Cir. 1997); *In re* Boston Tech., Inc. Sec. Litig., 8 F. Supp. 2d 43, 71 (D. Mass. 1998).

have long been held irrelevant to any reasonable investor's decision to buy or sell a security.[42] Stale information is also immaterial.[43] Perhaps more importantly, the materiality requirement can be a mechanism to raise the "truth on the market" defense, that all the information available, from whatever source, appraised the market of appropriate valuation and thus rendered any optimistic statement immaterial. At least seven post-Reform Act cases appear to apply the immateriality doctrine as codified.[44]

A recent district court case illustrates the potential protective sweep the immateriality prong offers. There, the Court found statements such as, "'we look forward to higher revenue and loan volume for the remainder of fiscal 1998"' to be so "vague and optimistic" as to be immaterial as a matter of law.[45]

Note should be taken of a potentially powerful, but anomalous, immateriality decision issued by the Sixth Circuit in *Helwig v.Vencor, Inc.*.[46] There, the Court, without explicitly announcing that it was proceeding under the "immateriality" prong of the safe harbor, held that forward-looking statements were insulated by the safe harbor simply because they were "soft information" about potential earnings and projected growth.[47] The Court stated simply that "soft

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[42]*See, e.g.*, Schoenhaut v. American Sensors, Inc., 986 F. Supp. 785, 792 (S.D.N.Y. 1997); Acuson, 1995 U.S. Dist. LEXIS at *13.

[43]*See, e.g., In re* Kidder Peabody Sec. Litig., 10 F. Supp. 2d 398, 412 (S.D.N.Y. 1998).

[44]*See In re* Theragenics Corp. Sec. Litig., 2000 WL 1028754 (N.D. Ga. July 20, 2000); Lain, 2000 U.S. Dist. LEXIS 9257; Manugistics, 1999 WL 1209509; Peritus, 52 F. Supp. 2d 211; Krim, 81 F. Supp. 621; Lumisys, 2 F. Supp. 2d at 1245; Leventhal, 1999 U.S. Dist. LEXIS at *27-28.

[45]Lain, 2000 U.S. Dist. 9257 at *9.

[46]210 F.3d 612.

[47]*Id.*

information" is not actionable.[48] I would suggest caution in citing this case for such a broad proposition – and I certainly would not use it as a guidepost in counseling clients. The Court seems to have leapt from the observation that there is no obligation to disclose soft information – which itself is not always true – to the conclusion that if soft information is disclosed, it is never actionable – an observation that is plainly false.

CONCLUSION

A scorecard, in this context, is a relatively primitive device for trying to figure out whether plaintiffs or defendants are currently "ahead." But to continue the metaphor for a moment, we're still in only the second inning or so, and the umpires in the Courts of Appeals and the Supreme Court have yet to call any close plays.

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[48] *Id.*